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IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-1220.

JAMES R. RICHARDSON,
Petitioner,

v.

HAMILTON INTERNATIONAL CORPORATION et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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INDEX.

	Page
OPINIONS BELOW	1
QUESTION PRESENTED	1
STATEMENT	2
ARGUMENT	6
I. The Decision Below Is of No Great Significance	6
II. There Is No Significant Due Process Question in This Case	10
III. There Is No Significant Question Under the Rules Enabling Act	11
IV. The Courts Below Applied the Prevailing Standards Applicable to Motions to Disqualify	12
V. There Is No Conflict Among the Circuits	14
CONCLUSION	18

TABLE OF CASES CITED.

Page

American Can Co. v. Citrus Feed Co., 436 F. 2d 1125 (5th Cir. 1971) 6,7

Berenyi v. Immigration Director, 385 U. S. 630 (1967) 12

Chugach Electric Ass'n v. United States District Court, 370 F. 2d 441 (9th Cir. 1966), cert. denied, 389 U. S. 820 (1967) 6,18

Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F. 2d 920 (2d Cir. 1954) 6

Cord v. Smith, 338 F. 2d 516 (9th Cir. 1964) 6

Doe v. A Corp., 330 F. Supp. 1352 (S. D. N. Y. 1971), aff'd sub nom. Hall v. A Corp., 453 F. 2d 1375 (2d Cir. 1972) 6

Emle Industries, Inc. v. Patentex, [1972] Trade Cas. ¶ 73,976 (S. D. N. Y.) 6

Empire Linotype School v. United States, 143 F. Supp. 627 (S. D. N. Y. 1956) 7

Estates Theatres, Inc. v. Columbia Pictures Industries, Inc., 345 F. Supp. 93 (S. D. N. Y. 1972) 6

Fleischer v. A. A. P., Inc., 163 F. Supp. 548 (S. D. N. Y. 1958), appeal dismissed sub nom. Fleischer v. Phillips, 264 F. 2d 515 (2d Cir.), cert. denied, 359 U. S. 1002 (1959) 7,14

Graver Mfg. Co. v. Linde Co., 336 U. S. 271 (1949), aff'd on rehearing, 339 U. S. 605 (1950) 12

Greene v. Singer Co., 461 F. 2d 242 (3d Cir.), cert. denied, 409 U. S. 848 (1972) 5

E. F. Hutton & Co. v. Brown, 305 F. Supp. 371 (S. D. Tex. 1969) 6,11

Marco v. Dulles, 169 F. Supp. 622 (S. D. N. Y.), appeal dismissed, 268 F. 2d 192 (2d Cir. 1959) 7

Shelley v. The Maccabees, 184 F. Supp. 797 (E. D. N. Y. 1960), cert. denied, 365 U. S. 818 (1961) 6,7

T. C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265 (S. D. N. Y. 1953) 7,13

TABLE OF CASES CITED (Continued).

	Page
United States v. Johnston, 268 U. S. 220 (1925)	12
United States v. Standard Oil Co., 136 F. Supp. 345 (S. D. N. Y. 1955)	7
United States v. Trafficante, 328 F. 2d 117 (5th Cir. 1964)	6, 8
Uniweld Products, Inc. v. Union Carbide Corp., 385 F. 2d 992 (5th Cir. 1967), cert. denied, 390 U. S. 921 (1968)	6
Walters v. St. Louis, 347 U. S. 231 (1954)	11
Waters v. Western Co., 436 F. 2d 1072 (10th Cir. 1971)	6

MISCELLANEOUS.

	Page
American Bar Association Code of Professional Responsibility, Canon 9	8
Pa. R. Civ. P. 205	12
United States District Court for the Eastern District of Pennsylvania, Rule 11	11, 12

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OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania (Pet. App. 10-22) is reported at 333 F. Supp. 1049 (E. D. Pa. 1971). The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1-7) is reported at 469 F. 2d 1382 (3d Cir. 1972).

QUESTION PRESENTED.

Was the court of appeals in error in holding that the district court did not exceed the bounds of its permissible discretion when it disqualified plaintiff, an attorney, from maintaining a shareholders' derivative and class action against his former client, its directors and its parent company?

STATEMENT.

In the exercise of its discretion to regulate the conduct of attorneys appearing before it, the United States District Court for the Eastern District of Pennsylvania (Judge VanArtsdalen), disqualified an attorney, James M. Richardson ("Richardson")[1] from maintaining this shareholders' derivative and class action against his former client, its directors and its parent company, and the Court of Appeals for the Third Circuit (Judges Van Dusen and Rosenn and Senior Judge Staley) affirmed. The court denied a petition for rehearing en banc.

The action, brought by Richardson as a former shareholder of the client (and as a present shareholder of its parent), alleged violations of federal securities laws and breaches of common-law fiduciary obligations by the defendants. Named as defendants were Alexander Hamilton Life Insurance Company of America ("Hamilton Life"), its directors, its parent company, Hamilton International Corporation ("Hamilton International"), and Hamilton Life's outside accounting firm, Lybrand, Ross Bros. & Montgomery.

In his complaint, Richardson averred that, prior to August 14, 1969, he was a shareholder of Hamilton Life and that, as a result of a merger that took place on that date, Hamilton Life became a wholly-owned subsidiary of Hamilton International, and the former shareholders of Hamilton Life (including Richardson) then became shareholders of Hamilton International. The complaint asserted that a proxy statement sent to shareholders of Hamilton Life in connection with the 1969 merger was false and misleading and failed to disclose certain allegedly material facts. According to the complaint, as originally filed, the

1. Incorrectly referred to in the caption of the petition as James *R.* Richardson.

facts that should have been disclosed in the proxy statement included alleged self-dealing by the individual defendants, alleged payment of excessive salaries and fees to them and alleged payments by Hamilton Life in 1966 and 1967 of approximately $100,000 in counsel fees for the personal benefit of three individual defendants who were officers and directors of Hamilton Life.

Claiming to sue (1) on his own behalf, (2) on behalf of a class of former shareholders of Hamilton Life and (3) derivatively on behalf of Hamilton Life, Richardson sought to set aside the 1969 merger, to cancel the issuance of certain shares of stock, to obtain an accounting and to recover compensatory and punitive damages.

Respondents (the defendants other than Lybrand) moved to dismiss the action on the ground that, by virtue of his former activities as counsel for them, Richardson was disqualified from maintaining or participating in the action (57a-58a).[2] The record before the district court showed that from September 1964 through June 1966, while Richardson was associated with the Philadelphia law firm of Schnader, Harrison, Segal & Lewis, that firm did extensive legal work for Hamilton Life. Richardson himself was deeply involved in the representation of Hamilton Life, devoting 669 hours of work to the interests of this one client. In the course of this representation, Richardson acquired extensive information about Hamilton Life and its officers and directors, and he was privy to numerous confidential disclosures made by them concerning the most intimate details of the company's operations (101a-103a, 204a-205a).

The district court concluded that the type of work done by Richardson suggested that he had received confidential information about "the entire workings of Hamilton Life up to and through June 1966 and in particular as to its

2. Lybrand later joined in the motion (59a). (References are to the appendix in the court of appeals.)

finances, corporate structure and operations" (Pet. App. 12-13). The court of appeals agreed, noting that Richardson had had access to "confidential information about Hamilton Life's finances, corporate structure and operations, which he would not have received had he not been its attorney" (Pet. App. 5).

Because the facts and the logical inferences to be drawn therefrom made it plain that the relationship between Richardson's former representation and the present case was such that there was a serious danger of a violation of attorney-client confidences if Richardson were allowed to proceed with the case, the district court held that Richardson was disqualified from maintaining this action against the respondents. In an opinion (Pet. App. 10-22) that carefully weighs "the conflicting policies of the law," on the one hand to protect shareholders of a corporation and, on the other hand, to protect the attorney-client relationship (Pet. App. 11, 21), Judge VanArtsdalen concluded that, under the circumstances of this case, the attorney-client relationship must be treated as paramount and Richardson should be disqualified.

The court of appeals affirmed. In an opinion by Judge Van Dusen (Pet. App. 1-7), that court emphasized the importance of encouraging a client to reveal to his attorney all possibly pertinent information and the importance of eliminating any apprehension by the client that such confidences could later be used against him. The court of appeals pointed out that, because of the importance of safeguarding and protecting communications between attorneys and clients, courts have generally disqualified an attorney from suing a former client when the new suit is so closely connected with the subject matter of the earlier representation that confidences might be involved. The court of appeals found ample basis in the record for the district court's conclusion that the information Richardson

had received in the earlier representation might be related to the present action, and, noting its recent holding in **Greene v. Singer Co.**, 461 F. 2d 242 (3d Cir.), *cert. denied*, 409 U. S. 848 (1972), that the actions of district courts on disqualification questions should be disturbed only where it can be said that the district court abused its permissible discretion, stated that, "On this record, the district court has not exceeded the bounds of its permissible discretion" (Pet. App. 7).

The court of appeals and the district court were both careful to note in their opinions (Pet. App. 5, 22) that the disqualification of Richardson in no way precluded any other Hamilton shareholder from maintaining a suit against the respondents based on the same contentions made by Richardson. The possibility of such action became a reality after the court of appeals' affirmance of the Richardson disqualification, when a former Hamilton shareholder by the name of Owen M. Johnson, Jr. moved in the district court to intervene as a party plaintiff in this action. On February 16, 1973, Judge VanArtsdalen granted the motion.

ARGUMENT.

I.

The Decision Below Is of No Great Significance.

Richardson would have this Court believe that his case presents a matter of overwhelming significance both to the parties and to the profession generally. This is a blatant exaggeration.

As for the profession generally, all the decision below represents is another in a long line of cases wherein the lower federal courts, in order "to safeguard the sacrosanct privacy of the attorney client relationship,"[3] have warned lawyers that they are precluded from participating in litigation against former clients when there is a danger that confidential information acquired by them in the course of the former representation will be used to the disadvantage of the former client. See, *e.g.*, **American Can Co. v. Citrus Feed Co.**, 436 F. 2d 1125 (5th Cir. 1971); **Waters v. Western Co.**, 436 F. 2d 1072 (10th Cir. 1971); **Uniweld Products, Inc. v. Union Carbide Corp.**, 385 F. 2d 992 (5th Cir. 1967), *cert. denied*, 390 U. S. 921 (1968); **Chugach Electric Ass'n v. United States District Court**, 370 F. 2d 441 (9th Cir. 1966), *cert. denied*, 389 U. S. 820 (1967); **Cord v. Smith**, 338 F. 2d 516 (9th Cir. 1964); **United States v. Trafficante**, 328 F. 2d 117 (5th Cir. 1964); **Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp.**, 216 F. 2d 920 (2d Cir. 1954); **Emle Industries, Inc. v. Patentex**, [1972] Trade Cas. ¶ 73,976 (S. D. N. Y.); **Estates Theatres, Inc. v. Columbia Pictures Industries, Inc.**, 345 F. Supp. 93 (S. D. N. Y. 1972); **Doe v. A Corp.**, 330 F. Supp. 1352 (S. D. N. Y. 1971), *aff'd sub nom.* **Hall v. A Corp.**, 453 F. 2d 1375 (2d Cir. 1972); **E. F. Hutton & Co. v. Brown**, 305 F. Supp. 371 (S. D. Tex. 1969); **Shelley v. The Maccabees**, 184 F. Supp.

3. **American Can Co. v. Citrus Feed Co.**, 436 F. 2d 1125, 1128 (5th Cir. 1971).

797 (E. D. N. Y. 1960), *cert. denied,* 365 U. S. 818 (1961); **Marco v. Dulles,** 169 F. Supp. 622 (S. D. N. Y.), *appeal dismissed,* 268 F. 2d 192 (2d Cir. 1959); **Fleischer v. A. A. P., Inc.,** 163 F. Supp. 548 (S. D. N. Y. 1958), *appeal dismissed sub nom.* **Fleischer v. Phillips,** 264 F. 2d 515 (2d Cir.), *cert. denied,* 359 U. S. 1002 (1959); **Empire Linotype School v. United States,** 143 F. Supp. 627 (S. D. N. Y. 1956); **United States v. Standard Oil Co.,** 136 F. Supp. 345 (S. D. N. Y. 1955); **T. C. Theatre Corp. v. Warner Bros. Pictures, Inc.,** 113 F. Supp. 265 (S. D. N. Y. 1953).

The lower federal courts have not hesitated to enter disqualification orders in appropriate cases. "To disqualify his former attorney, the former client need show no more than that the matters involved in the pending suit in which his former attorney represents his adversary are substantially related to the matters or cause of action in which the attorney previously represented him, the former client." **American Can Co. v. Citrus Feed Co.,** *supra,* at 1128.

The only aspect of Richardson's case that was in any way different from the general run of cases is that Richardson himself (represented by his law partner) was the litigant opposing the former clients, rather than the litigant's attorney. But there is certainly nothing startling—or even unprecedented—about a court's applying the standards developed in the latter context to this situation. It is difficult to imagine that any lawyer would seriously believe that he has the right to be a plaintiff in a suit against a former client in a setting where he would be barred, on ethical grounds, from acting as attorney for some other plaintiff. And it is even harder to conceive that any court would hold that a lawyer-plaintiff owes a lesser obligation to his former client than a lawyer who acts only as attorney for the plaintiff. If anything, courts should be

more, not less, prone to disqualify a lawyer who is the plaintiff than one who is an attorney for the plaintiff, since there are no third persons whose interests have to be considered when the lawyer and the plaintiff are one and the same.

The fundamental objectives of disqualification, when it is necessary, are preservation of the integrity of the legal profession and protection of the attorney-client relationship through assurance to the client that matters revealed by him in confidence to his attorney will not be used against the client in the future. It is to prevent that potential abuse of the prior attorney-client relationship that the courts have fashioned the rule prohibiting an attorney from proceeding against his former client when there is a substantial relationship between the prior representation and the present suit. The reason for the rule is equally applicable whether the position of the attorney in the suit is that of litigant or that of counsel. The potential abuse of confidence is the evil in either case.

The decision below should be of no concern to lawyers who live up to their moral and ethical obligation to strive to avoid all appearances of impropriety. See Canon 9, American Bar Association Code of Professional Responsibility. See also **United States v. Trafficante**, 328 F. 2d 117, 120 (5th Cir. 1964), where the court stated:

> "The Preamble to the Canons of Ethics admonishes the members of the bar that their conduct should be such as to merit the approval of all good men. That conduct should not be weighed with hair-splitting nicety. We have found no exceptions to the exhortation to 'abstain from all appearances of evil.' 1 Thessalonians 5:22."

As for the parties themselves, the decision below obviously has had the salutary effect of cleansing the record of

the appearance of professional impropriety and avoiding the danger that confidential information might be misused. From the defendants' standpoint, that is about all that has been accomplished. Certainly, the disqualification of Richardson does not permit the defendants to "get away" with anything. The courts below made it clear that the action was not being dismissed in its entirety, and they expressly left it open to other Hamilton shareholders to maintain another action based on the same contentions made by Richardson. The proof of this is seen in the fact that, subsequent to the decision of the court of appeals in this case, another Hamilton shareholder, Owen M. Johnson, Jr., was permitted to intervene in the district court as a named plaintiff. Thus, the action commenced by Richardson continues in a viable state against the defendants. All that has been changed is the identity of the plaintiff and the plaintiff's attorney.

Nor has the ruling below had any real effect on Richardson's substantive rights. True, Richardson has been precluded from actively participating in the action, but that preclusion has in no way affected his substantive rights. Richardson is still a member of the plaintiff class, and there is absolutely nothing in the opinions below that would preclude him from sharing in any recovery that might be obtained for the plaintiff class if the action is permitted to proceed as a class action. If the class has a valid claim, Johnson would appear to be as well equipped as Richardson to pursue that claim on behalf of the class. Richardson's only advantage over Johnson stems from the insight into Hamilton's affairs and the confidential information garnered by him during the course of his former representation—the very circumstances that required his disqualification.

Far from being deprived of substantive rights, what Richardson has really lost as a result of the disqualification

ruling is the potential counsel fee that might be earned by an attorney who wins the race to the courthouse and acts as counsel for a class representative. That is really what Richardson's petition for certiorari is all about. If Richardson were truly concerned about correcting the alleged violations of the securities laws about which he complains, he would not have petitioned for certiorari but would have let the action proceed in the district court with Johnson as the sole class representative. Richardson's filing of the petition was, we submit, motivated solely by greed, the greed that overtakes an attorney's sense of values when he visualizes himself as counsel for a huge class in an action in which many dollars may be involved.

II.

There Is No Significant Due Process Question in This Case.

Richardson's argument that the disqualification order has somehow deprived him of his property without due process of law is completely specious. The decision below has taken no property from Richardson. He still owns his shares of stock in the company. He has not been deprived of any right to participate in any recovery that might be obtained for a class. All the courts below did was hold that, because of the importance of preserving and protecting the attorney-client relationship, Richardson should not be permitted to be an active litigant in this case.

Such a ruling did not deprive Richardson of any property rights. When one becomes a member of the bar, he undertakes certain obligations, including the obligation to preserve the confidences of each of his clients and not sue a former client when there is a danger that, intentionally or unintentionally, he may "make use of confidential information received from the former client while espousing his cause." **T. C. Theatre Corp. v. Warner Bros. Pictures, Inc.,**

supra, at 269. When a lawyer purchases shares of stock in his client's business, he does so not as a general member of the public but as an attorney who is subject to restrictions on what he can and cannot do. At the very moment Richardson purchased his shares of stock in Hamilton, he was acting as Hamilton's attorney (103a-104a), and he was, therefore, subject to these inhibitions. There was no deprivation of due process.

III.

There Is No Significant Question Under the Rules Enabling Act.

In this Court, Richardson argues for the first time that the actions of the courts below in disqualifying him as a party plaintiff in this case violated the Rules Enabling Act.

Not having been raised in the courts below, this issue is not properly before this Court. See **Walters v. St. Louis,** 347 U. S. 231, 233 (1954).

Moreover, the argument itself is, in any event, totally lacking in merit. The courts below were not relying on any particular rules of court when they disqualified Richardson. They were relying on an inherent power. It has long been recognized in the federal courts that the power to disqualify an attorney from participating in litigation adverse to the interests of a former client does not depend on the specific language of a particular rule of court but arises from an inherent power of courts to supervise the conduct of attorneys practicing before them. See authorities collected in **E. F. Hutton & Co. v. Brown,** 305 F. Supp. 371, 377 n. 7 (S. D. Tex. 1969).

Further, even if it could be said that the action of the courts below in disqualifying Richardson was bottomed on local Rule 11 of the United States District Court for the Eastern District of Pennsylvania (which adopts the Ameri-

can Bar Association Canons of Ethics as "standards of conduct for attorneys of this Court"), the fact of the matter is that the adoption of local Rule 11 did not "abridge, enlarge or modify any substantive right" that Richardson possessed. For, with or without local Rule 11, Richardson was duty bound to conform his conduct to the American Bar Association's Canons of Ethics and Code of Professional Responsibility. The Canons were adopted in 1908—some forty years before Congress's adoption of the Rules Enabling Act. Richardson was subject to the inhibitions of the Canons of Ethics from the moment of his admission to the bar in 1955 and of the Code of Professional Responsibility from January 1, 1970, the date it became automatically effective in Pennsylvania. Pa. R. Civ. P. 205. Local Rule 11 added nothing to this obligation.

IV.

The Courts Below Applied the Prevailing Standards Applicable to Motions to Disqualify.

It is well settled that this Court ordinarily will "not grant a certiorari to review evidence and discuss specific facts." **United States v. Johnston,** 268 U. S. 220, 227 (1925). There is even less reason for this Court to take a case to review a factual issue where the factual determination of the district court has received the concurrence of the court of appeals. This Court has often held that " a court of law, such as this Court is, rather than a Court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." **Graver Mfg. Co. v. Linde Co.,** 336 U. S. 271, 275 (1949), *aff'd on rehearing,* 339 U. S. 605 (1950); **Berenyi v. Immigration Director,** 385 U. S. 630, 635 (1967).

A review of factual determinations is exactly what Richardson seeks here.

Richardson argues that the district court and the court of appeals cast aside the "prevailing standard" in favor of some new standard, but an examination of the petition and the opinions below makes clear that this is not so. Thus, according to the petition (Pet. 28), "the prevailing standard in the lower federal courts" is the "substantial relation" test set forth in **T. C. Theatre Corp. v. Warner Bros. Pictures, Inc.**, 113 F. Supp. 265 (S. D. N. Y. 1953). Far from deviating from the **T. C. Theatre** opinion, both of the courts below relied on it. Thus, the district court's opinion states (Pet. App. 15-16):

> "The oft quoted case, *T. C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S. D. N. Y. 1953), provides the insight to the standards here applicable."

And the court of appeals' opinion says (Pet. App. 4):

> "The plaintiff contends that it is incumbent on the defendants to come forward with evidence to demonstrate that the previous representation is related to the present representation. The rule, however, is clear that the defendants need not show by direct evidence that Mr. Richardson acquired information in the course of the previous litigation which is to be used in the pending action. They only need to show that Mr. Richardson might have acquired substantially related material. *T. C. Theatre Corp. v. Warner Bros. Pictures, supra.* . . ."

Thus, what we have in the opinions below is not a denial of the "substantial relationship" test but a reaffirmation of it.

Richardson's real claim then is not that the proper test was ignored but that it was misapplied in the context of the facts of this case. But, as noted above, it is plain that the question of whether a particular standard has been applied correctly in a particular factual setting is not the type of question on which this Court should exercise its discretionary power of review on certiorari.

V.

There Is No Conflict Among the Circuits.

Richardson strains to establish (Pet. 30-33) that the decision below has created some sort of conflict among the circuits on the question of who has the burden of proof in disqualification matters. But this is not so. The courts below did not purport to deviate from the prevailing approach to the question of disqualification. They did not "thrust the burden of proof back upon [petitioner] to show no relation between the matters" (Pet. 31).

What the courts below did was to hold that the facts adduced by the respondents and the logical inferences to be drawn therefrom were sufficient to demonstrate that the relationship between Richardson's former representation and the present case was such that there was a serious danger of a violation of attorney-client confidences if Richardson were allowed to proceed as plaintiff. There is nothing remarkable about such a conclusion. In one of the cases heavily relied on by petitioner, it was pointed out that "the pragmatic test for disqualification is whether the prior matters or evidence concerning them may be admitted into evidence with respect to the current litigation." **Fleischer v. AAP, Inc.**, *supra*, 163 F. Supp. at 553.

Certainly, the affidavits and deposition testimony that made up the record in the district court revealed that evidence concerning the prior matters would be admissible in

this case. The most apparent such matter concerns the $100,000 in counsel fees. In his prior representation, Richardson worked on, and received confidential disclosures pertaining to, the very same matter that ultimately gave rise to Hamilton Life's paying the counsel fees. In the present case, Richardson attacked the propriety of that payment, contending that it was for the individual benefit of three officers and directors and not for the benefit of the company itself. When he filed his complaint, Richardson was fully aware that counsel for the company had taken the position that the payment of these fees was for the benefit of the company (119a-121a, 179a, 182a). It seems perfectly obvious that proper resolution of this dispute must, of necessity, require inquiry into the same underlying factual situation that Richardson investigated on Hamilton Life's behalf and as to which Hamilton Life and the three individuals imparted confidential information to him, as Richardson admitted in his deposition. Certainly, there is a "substantial relationship" between Richardson's former representation and this aspect of the lawsuit Richardson sought to maintain.[4]

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4. In a footnote running three pages (footnote 3, Pet. 11-13), Richardson seeks to establish that the issue of the $100,000 in counsel fees was effectively eliminated from the case when he amended his complaint to delete a specific claim against the respondents relating to the payment of those fees, a deletion that Richardson has the temerity to state "was not undertaken to avoid an imputation of conflict of interest, as respondents attempted to suggest in the proceedings below" (Pet. 11).

The amended complaint did not delete the issue of the $100,000 in counsel fees from the case. All it did was change the emphasis. Thus, whereas the original complaint contained three specific charges relating to the $100,000 in counsel fees [paragraphs 14(c), 33(i) and 34(a)(iii)], the amended complaint made only a single specific reference to the payment of those fees [paragraph 34(a)(iii)] but continued to use general catchall language which could be said to incorporate these charges by reference [*e.g.*, paragraph 33(i)]. Moreover, even if it could be said that the amended complaint effectively dropped from the case Richardson's claim against the respondents based on the payment of the $100,000 in counsel fees, the

4. (Cont'd.)

amended complaint kept the issue of those fees in the case by continuing to assert a claim against Lybrand based on that defendant's failure to disclose the payment of those fees. So long as questions relating to those fees remained in the case, the potentiality existed that Richardson might use confidential information derived from the attorney-client relationship to the detriment of his former client.

But what is most disconcerting about the footnote in Richardson's petition is the representation that Richardson's deletion of the allegations relating to the $100,000 counsel fees "was not undertaken to avoid an imputation of conflict of interest." The explanation set forth in the petition about Richardson's reasons for amending the complaint (his alleged receipt between the original complaint and the amended complaint of a preliminary prospectus issued almost four months before the filing of the original complaint and his alleged decision based on a perusal of that prospectus to drop the claim for a return of the $100,000 in counsel fees because he now felt that the corporation had "satisfied any reasonable demand for relief which could have been made against it for payment of the legal fees") finds absolutely no support in the record of this case and is inherently incredible.

The original complaint in this case was filed on March 24, 1971 (1a), almost four months after the date of the preliminary prospectus (Pet. App. 36-38), and the amended complaint was not filed until July 27, 1971 (2a). In the interim between those two dates, counsel for the respondents told Richardson and his counsel that the respondents were going to raise the question of Richardson's disqualification, and the respondents made this a matter of record on July 19, 1971 (2a), eight days before Richardson filed his amended complaint, when they filed a memorandum in opposition to Richardson's class action motion in which they stated, *inter alia*, "The motion is premature, having been made prior to resolution of a more basic question, to wit whether plaintiff and his counsel are disqualified from maintaining the action in view of plaintiff's prior involvement as counsel for Alexander Hamilton Life Insurance Company of America, one of the defendants herein. This question will be raised by separate motion." On August 2, 1971 (60a), five days after the amended complaint was filed, counsel for the respondents deposed Richardson. Each time counsel asked about Richardson's reasons for deleting the counsel fee reference in the amended complaint, Richardson's counsel (and law partner) asserted that this was a privileged matter and instructed Richardson not to answer. Richardson refused to answer (109a-114a, 160a-164a).

The obvious inference from all this was that Richardson had deleted the reference to the $100,000 in counsel fees from certain portions of the complaint in preparation for the anticipated challenge to his qualification to maintain this action. Richardson never en-

Richardson's disqualification runs even deeper than his prior involvement with the portion of the case relating to the $100,000 in counsel fees. In his former representation of Hamilton Life, in the course of preparing a registration statement for that company, in the course of conducting his investigation into the subjects raised by an SEC investigation, in the course of examining files, in the course of interviewing the officers and directors, in the course of preparing them for their testimony, and in the course of being generally privy to confidential disclosures by Hamilton Life and its officers and directors during the period of the Schnader, Harrison, Segal & Lewis representation of that company, Richardson acquired confidential information about the most intimate details of the company's operations. Because of these intimate and detailed discussions and disclosures, there was a serious danger that Richardson would make improper use of confidential informa-

4. (Cont'd.)

deavored to dispute this inference in the district court. Indeed, he never endeavored to offer the district court any explanation at all for the deletion.

The first time Richardson made any effort whatsoever to explain the deletion was during oral argument in the court of appeals when his counsel (and law partner), in response to a question from the bench, said:

> "The amendment was made because as a result of a filing that defendants had made with the Securities & Exchange Commission, a registration statement which we wrote away and asked for, we found that suit had been started in Detroit for the recovery of this $100,000 in fees. This statement was made in the registration statement to the SEC, so we felt it no longer needed to be made by us." (Page 7 of unofficial transcript of argument before court of appeals filed with the petition for certiorari.)

This cryptic and somewhat ambiguous explanation to the court of appeals has been blown up into a full-scale scenario in this Court, complete with an exhibit (Pet. App. 35-38) that has first seen the light of day in the petition. This belated "explanation" was not presented to the district court and has never been put to the test of cross-examination, a test we are certain it could never withstand.

tion. To use the language of the Court of Appeals for the Ninth Circuit in **Chugach Electric Ass'n v. United States District Court**, 370 F. 2d 441, 443 (9th Cir. 1966), *cert. denied*, 389 U. S. 820 (1967), a "likelihood here exists which cannot be disregarded" that Richardson's "knowledge of private matters gained in confidence would provide him with greater insight and understanding of the significance of subsequent events. . . ."

That was enough to require his disqualification.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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